

Department of the Army, DoD

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(2) A record must exist and be in the possession and control of DA at the time of the request to be considered subject to this part and the FOIA. There is no obligation to create or compile a record to satisfy a FOIA request.

(3) Hard copy or electronic records that are subject to FOIA requests under 5 U.S.C. 552 (a)(3), and that are available to the public through an established distribution system such as the Government Printing Office (GPO), FEDERAL REGISTER, National Technical Information Service (NTIS), or the Internet, normally need not be processed under the provisions of the FOIA. If a request is received for such information, Army Activities shall provide the requester with guidance, inclusive of any written notice to the public, on how to obtain the information. However, if the requester insists that the request be processed under the FOIA, then the request shall be processed under the FOIA. If there is any doubt as to whether the request must be processed, contact DA, FOIA/PA Office.

(c) *Army activity.* A specific area of organizational or functional responsibility within DA, authorized to receive and act independently on FOIA requests.

(d) *Initial denial authority (IDA).* An official who has been granted authority by the Secretary of the Army to deny records requested under the FOIA based on one or more of the nine categories of exemptions from mandatory disclosure. An IDA also: Denies a fee category claim by a requester; denies a request for expedited processing due to demonstrated compelling need; denies a request for a waiver or reduction of fees; reviews a fee estimate; and confirms that no records were located in response to a request.

(e) *Appellate authority.* The Secretary of the Army or designee having jurisdiction for this purpose over the record, or any of the other adverse determinations. The DA appellate authority is the Office of the Army General Counsel (OGC).

(f) *Administrative appeal.* A request by a member of the general public, made under the FOIA, asking the appellate authority of the Army to reverse a decision to: Withhold all or part of a re-

quested record; deny a fee category claim by a requester; deny a request for expedited processing due to demonstrated compelling need; deny a request for waiver or reduction of fees; deny a request to review an initial fee estimate; and confirm that no records were located during the initial search. Requesters also may appeal the failure to receive a response determination within the statutory time limits, a fee estimate, and any determination that the requester believes is adverse in nature.

(g) *Public interest.* The interest in obtaining official information that sheds light on an activity's performance of its statutory duties because the information falls within the statutory purpose of the FOIA to inform citizens about what their Government is doing. That statutory purpose, however, is not fostered by disclosure of information about private citizens accumulated in various governmental files that reveals nothing about an agency's or official's own conduct.

(h) *Electronic record.* Records (including e-mail) that are created, stored, and retrievable by electronic means.

(i) *Federal agency.* As defined by 5 U.S.C. 552 (f)(1), a Federal agency is any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

(j) *Law enforcement investigation.* An investigation conducted by a command or activity for law enforcement purposes relating to crime, waste, fraud or national security. Such investigations may include gathering evidence for criminal prosecutions and for civil or regulatory proceedings.

§518.8 Freedom of Information requirements.

(a) *Compliance with the FOIA.* Army personnel are expected to comply with the FOIA, this part, and Army FOIA policy in both letter and spirit. This strict adherence is necessary to provide uniformity in the implementation of the Army FOIA Program and to create conditions that will promote public trust.

(b) *Openness with the public.* The DA shall conduct its activities in an open manner consistent with the need for security and adherence to other requirements of law and regulation. Records not specifically exempt from disclosure under the Act shall, upon request, be made readily accessible to the public in accordance with rules promulgated by competent authority, whether or not the Act is invoked.

(1) *Operations Security (OPSEC).* DA officials who release records under the FOIA must also consider OPSEC. The Army implementing directive is AR 530-1.

(2) *DA Form 4948-R.* This form lists references and information frequently used for FOIA requests related to OPSEC. Persons who routinely deal with the public (by telephone or letter) on such requests should keep the form on their desks as a guide.

(c) *Avoidance of procedural obstacles.* Army Activities shall ensure that procedural matters do not unnecessarily impede a requester from obtaining DA records promptly. The Army shall provide assistance to requesters to help them understand and comply with procedures established by this part and any supplemental regulations published by the Army Activities. Coordination of referral of requests with DA FOIA/PA Office should be made telephonically in order to respond to the requester in a timelier manner. Requests will not be mailed to the DA FOIA/PA Office for disposition or coordination with other IDAs.

(d) *Prompt action on requests and final response determinations.* Generally, when a member of the public complies with the procedures established in this part or instructions for obtaining DA records, and after the request is received by the official designated to respond, Army Activities shall endeavor to provide a final response determination within the statutory 20 working days. If a significant number of requests, or the complexity of the requests prevent a final response determination within the statutory time period, Army Activities shall advise the requester of this fact, and explain how the request will be responded to within its multitrack processing system. A final response determination is notifi-

cation to the requester that the records are released or partially released, or will be released on a certain date, or the records are withheld under an appropriate FOIA exemption, or the records cannot be provided for one or more of the other reasons. Interim responses acknowledging receipt of the request, negotiations with the requester concerning the scope of the request, the response timeframe, and fee agreements are encouraged; however, such actions do not constitute a final response determination pursuant to the FOIA. If a request fails to meet minimum requirements as set forth, Activities shall contact the requester and inform the requester what would be required to perfect or correct the request, or to limit the scope to allow for the most expeditious response. The statutory 20 working day time limit applies upon receipt of a perfected or correct FOIA request. Before mailing a final response determination and those records or portions thereof deemed releasable, records custodians will obtain a written legal opinion from their servicing judge advocate concerning the releasability of the requested records. The legal opinion must cite specific exemptions, appropriate justification, and identify if the records were processed under the FOIA, PA (including the applicable systems notice), or both.

(1) *Multi-track processing.* When an Army Activity has a significant number of pending requests that prevents a response determination being made within 20 working days, the requests shall be processed in a multitrack processing system, based on the date of receipt, the amount of work and time involved in processing the requests, and whether the request qualifies for expedited processing. Army Activities may establish as many processing queues as they wish; however, as a minimum, three processing tracks shall be established, all based on a first-in, first-out concept, and rank ordered by the date of receipt of the request. One track shall be a processing queue for simple requests, one track for complex requests, and one track shall be a processing queue for expedited processing. Determinations as to whether a request is simple or complex shall be made by each Army Activity.

Army Activities shall provide a requester whose request does not qualify for the fastest queue an opportunity to limit the scope of the request in order to qualify for the fastest queue. This multitrack processing system does not obviate an Activity's responsibility to exercise due diligence in processing requests in the most expeditious manner possible.

(2) *Expedited processing.* A separate queue shall be established for requests meeting the test for expedited processing. Expedited processing shall be granted to a requester after the requester requests such and demonstrates a compelling need for the information. Notice of the determination as to whether to grant expedited processing in response to a requester's compelling need shall be provided to the requester within 10 calendar days after receipt of the request in the Army Activity's office that will determine whether to grant expedited processing. Once the Army Activity has determined to grant expedited processing, the request shall be processed as soon as practicable. Actions by Army Activities to initially deny or affirm the initial denial on appeal of a request for expedited processing and a failure to respond in a timely manner shall be subject to judicial review. Initial determination of denials of expedited processing will be immediately forwarded to the IDA for action. If the IDA upholds the denial, the requester will be informed of his or her right to appeal.

(i) *Imminent threat.* Compelling need means that the failure to obtain the records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual.

(ii) *Alleged Federal Government activity.* Compelling need also means that the information is urgently needed by an individual primarily engaged in disseminating information in order to inform the public concerning actual or alleged Federal Government activity. An individual primarily engaged in disseminating information means a person whose primary activity involves publishing or otherwise disseminating information to the public. Representatives of the news media would normally qualify as individuals primarily

engaged in disseminating information. Other persons must demonstrate that their primary activity involves publishing or otherwise disseminating information to the public.

(iii) *General public interest.* Urgently needed means that the information has a particular value that will be lost if not disseminated quickly. Ordinarily this means a breaking news story of general public interest. However, information of historical interest only or information sought for litigation or commercial activities would not qualify, nor would a news media publication or broadcast deadline unrelated to the news breaking nature of the information.

(iv) *Certified statement.* A demonstration of compelling need by a requester shall be made by a statement certified by the requester to be true and correct to the best of his or her knowledge. This statement must accompany the request in order to be considered and responded to within the 10 calendar days required for decisions on expedited access.

(v) *Other reasons for expedited processing.* Another reason that merits expedited processing by Army FOIA offices is an imminent loss of substantial due process rights. A demonstration of imminent loss of substantial due process rights shall be made by a statement certified by the requester to be true and correct to the best of his or her knowledge. The statement mentioned in paragraph (iv) of this section must accompany the request in order to be considered and responded to within the 10 calendar days required for decisions on expedited access. Once the decision has been made to expedite the request for this reason, the request may be processed in the expedited processing queue behind those requests qualifying for compelling need.

(vi) *Administrative appeals.* These same procedures also apply to requests for expedited processing of administrative appeals.

(e) *Use of exemptions.* It is Army policy to make records publicly available, unless the record qualifies for exemption under one or more of the nine exemptions. Discretionary releases of information protected under the FOIA

should be made only after full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure of the information. When Army activities determine to withhold information using one of the nine exemptions, the Department of Justice (DOJ) will defend the position unless it is found to be lacking a Sound Legal Basis for denial.

(1) Parts of a requested record may be exempt from disclosure under the FOIA. The proper DA official may delete exempt information and release the remainder to the requester. The proper official also has the discretion under the FOIA to release exempt information when appropriate; he or she must exercise this discretion in a reasonable manner, within regulations consistent with current policy considerations. The excised copies shall clearly reflect the denied information by the use of brackets, indicating the removal of information. Bracketed areas must be sufficiently removed so as to reveal no information. The best means to ensure illegibility is to cut out the information from a copy of the document and reproduce the appropriate pages.

(2) If the document is declassified, all classification markings shall be lined through with a single black line, which will allow the markings to be read. The document shall then be stamped "Unclassified."

(f) *Public domain.* Nonexempt records released under the authority of this part are considered to be in the public domain. Such records may also be made available in the DA reading room in paper form, as well as electronically, to facilitate public access. Exempt records disclosed without authorization by the appropriate Army FOIA official do not lose their exempt status. Also, while authority may exist to disclose records to individuals in their official capacity, the provisions of this part apply if the same individual seeks the records in a private or personal capacity.

(g) *Creating a record.* A record must exist and be in the possession and control of DA at the time of the search to be considered subject to this part and the FOIA. There is no obligation to

create or compile a record to satisfy a FOIA request. An Army Activity, however, may compile a new record when so doing would result in a more useful response to the requester, or be less burdensome to the agency than providing existing records, and the requester does not object. Cost of creating or compiling such a record may not be charged to the requester unless the fee for creating the record is equal to or less than the fee that would be charged for providing the existing record. Fee assessments shall be in accordance with subpart F of this part.

(1) Concerning electronic data, the issue of whether records are actually created or merely extracted from an existing database is not always readily apparent. Consequently, when responding to FOIA requests for electronic data where creation of a record, programming, or particular format are questionable, Army Activities should apply a standard of reasonableness.

(2) If the capability exists to respond to the request, and the effort would be a business as usual approach, then the request should be processed. However, the request need not be processed where the capability to respond does not exist without a significant expenditure of resources, thus not being a normal business as usual approach. As used in this sense, a significant expenditure of resources in both time and/or manpower that would cause a significant interference with the operation of the Army Activity's automated information system would not be a business as usual approach.

(h) *Description of requested record.* Identification of the record desired is the responsibility of the requester. The requester must provide a description of the desired record that enables the Government to locate the record with a reasonable amount of effort. In order to assist Army Activities in conducting more timely searches, requesters should endeavor to provide as much identifying information as possible. When an Army Activity receives a request that does not reasonably describe the requested record, it shall contact the requester and afford the requester the opportunity to perfect the request. Army Activities are not obligated to act on the request until the requester

perfects the request. When practicable, Army Activities shall contact the requester to aid in identifying the records sought and in reformulating the request to reduce the burden on the agency in complying with the Act. DA FOIA officials will reply to unclear requests by: Describing the defects in the requests; explaining the types of information described below, and ask the requester for such information; and explaining that no action will be taken on the request until the requester replies to the letter.

(1) The following guidelines are provided to deal with generalized requests and are based on the principle of reasonable effort. Descriptive information about a record may be divided into two broad categories: Category I is file-related and includes information such as type of record (for example, memorandum), title, index citation, subject area, date of record creation, and originator; Category II is event-related and includes the circumstances that resulted in the record being created or the date and circumstances surrounding the event the record covers.

(2) Generally, a record is not reasonably described unless the description contains sufficient Category I information to permit an organized, non random search based on the Army Activity's filing arrangements and existing retrieval systems, or unless the record contains sufficient Category II information to permit an inference of the Category I elements needed to conduct such a search.

(3) The following guidelines deal with requests for personal records. Ordinarily, when personal identifiers are provided only in connection with a request for records concerning the requester, only records in a PA system of records that can be retrieved by personal identifiers need be searched. However, if an Army Activity has reason to believe that records on the requester may exist in a record system other than a PA system, the Army Activity shall search that system under the provisions of the FOIA. In either case, Army Activities may request a reasonable description of the records desired before searching for such records under the provisions of the FOIA and the PA. If the record is re-

quired to be released under the FOIA, the Privacy Act does not bar its disclosure.

(4) The previous guidelines notwithstanding, the decision of the Army Activity concerning reasonableness of description must be based on knowledge of its files. If the description enables Army Activity personnel to locate the record with reasonable effort, the description is adequate. The fact that a FOIA request is broad or burdensome in its magnitude does not, in and of itself, entitle an Army Activity to deny the request on the ground that it does not reasonably describe the records sought. The key factor is the ability of the Army Activity's staff to reasonably ascertain and locate which records are being requested.

(i) *Referrals.* The Army FOIA referral policy is based upon the concept of the originator of a record making a release determination on its information. If an Army Activity receives a request for records originated by another Army Activity, it will contact the Army Activity to determine if it also received the request, and if not, obtain concurrence from the other Army Activity to refer the request. An Army Activity shall refer a FOIA request for a classified record that it holds to another Army Activity, DoD Component, or agency outside the DoD, if the record originated in another Army Activity or DoD Component or outside agency, or if the classification is derivative. In this situation, provide the record and a release recommendation on the record with the referral action. In either situation, the requester shall be advised of the action taken, unless exempt information would be revealed. While referrals to originators of information result in obtaining the best possible decision on release of the information, the policy does not relieve Army Activities from the responsibility of making a release decision on a record should the requester object to referral of the request and the record. Should this situation occur, Army Activities shall still coordinate with the originator of the information prior to making a release determination. A request received by an Army Activity having no records responsive to a request shall be referred routinely to another Army Activity, if

the other Army Activity has reason to believe it has the requested records. Prior to notifying a requester of a referral to another Army Activity, the Army Activity receiving the initial request shall consult with the other Army Activity to determine if that Army Activity's association with the material is exempt. If the association is exempt, the Army Activity receiving the initial request will protect the association and any exempt information without revealing the identity of the protected Army Activity. The protected Army Activity should be responsible for submitting the justifications required in any litigation. Any Army Activity receiving a request that has been misaddressed shall refer the request to the proper address and advise the requester. Army Activities making referrals of requests for records shall include with the referral, a point of contact by name, a telephone number, and an e-mail address. If the office receiving the FOIA request does not know where the requested records are located, that activity will contact the DA, FOIA/PA Office, to determine the office where the request should be referred.

(1) An Army Activity shall refer for response directly to the requester a FOIA request for a record that it holds to another Army Activity or agency outside the Army, if the record originated in the other Army Activity or outside agency. Whenever a record or a portion of a record is referred to another Army Activity or to a Government Agency outside of the Army for a release determination and direct response, the requester shall be informed of the referral, unless it has been determined that notification would reveal exempt information. Referred records shall only be identified to the extent consistent with security requirements.

(2) An Army Activity may refer a request for a record that it originated to another Army Activity or agency when the other Army Activity or agency has a valid interest in the record, or the record was created for the use of the other Army Activity or agency. In such situations, provide the record and a release recommendation on the record with the referral action. Include a point of contact with the telephone

number. An example of such a situation is a request for audit reports prepared by the U.S. Army Audit Agency. These advisory reports are prepared for the use of contracting officers and their release to the audited contractor shall be at the discretion of the contracting officer. A FOIA request shall be referred to the appropriate Army Activity and the requester shall be notified of the referral, unless exempt information would be revealed. Another example is a record originated by an Army Activity or agency that involves foreign relations, and could affect an Army Activity or organization in a host foreign country. Such a request and any responsive records may be referred to the affected Army Activity or organization for consultation prior to a final release determination within DA.

(3) Within DA, an Army Activity shall ordinarily refer a FOIA request and a copy of the record it holds but that originated with another Army Activity or that contains substantial information obtained from another Army Activity, to that Activity for direct response, after direct coordination and obtaining concurrence from the Activity. The requester then shall be notified of such referral. Army Activities shall not, in any case, release or deny such records without prior consultation with the other Army Activity.

(4) Army Activities that receive referred requests shall answer them in accordance with the time limits established by the FOIA, this part, and their multitrack processing queues, based upon the date of initial receipt of the request at the referring Activity or agency.

(5) Agencies outside DA that are subject to the FOIA.

(i) An Army Activity may refer a FOIA request for any record that originated in an agency outside DA or that is based on information obtained from an outside agency to the agency for direct response to the requester after coordination with the outside agency, if that agency is subject to FOIA. Otherwise, the Army Activity must respond to the request.

(ii) An Army Activity shall refer to the agency that provided the record any FOIA request for investigative, intelligence, or any other type of records

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that are on loan to DA for a specific purpose, if the records are restricted from further release and so marked. However, if for investigative or intelligence purposes, the outside agency desires anonymity, an Army Activity may only respond directly to the requester after coordination with the outside agency.

(6) Army Activities that receive requests for records of the National Security Council (NSC), the White House, or the White House Military Office (WHMO) shall process the requests. Army records in which the NSC or White House has a concurrent reviewing interest, and NSC, White House, or WHMO records discovered in Army Activity's files shall be forwarded through DA, FOIA/PA Office, to the Washington Headquarters Services, Office For Freedom of Information and Security Review (OFOISR). The OFOISR shall coordinate with the NSC, White House, or WHMO and return the records to the originating agency after coordination.

(7) To the extent referrals are consistent with the policies expressed by this section, referrals between offices of the same Army Activity are authorized.

(8) On occasion, the DA receives FOIA requests for Government Accountability Office (GAO) records containing Army information. Even though the GAO is outside the Executive Branch, and not subject to the FOIA, all FOIA requests for GAO documents containing Army information received either from the public or on referral from the GAO shall be processed under the provisions of the FOIA.

(j) *Authentication.* Records provided under this part shall be authenticated with an appropriate seal, whenever necessary, to fulfill an official Government or other legal function. This service, however, is in addition to that required under the FOIA and is not included in the FOIA fee schedule. Army Activities may charge for the service at a rate of \$5.20 for each authentication.

(k) *Records management.* FOIA records shall be maintained and disposed of in accordance with the National Archives and Records Administration (NARA)

General Records Schedule and DoD Component records schedules.

(1) *Record-keeping requirements in accordance with the Army Records Information Management System (ARIMS).* The records listed below are required by ARIMS in the conduct of the daily business of the Army to provide adequate and proper documentation to protect the rights and interests of individuals and the Federal Government. The full description of the records and their disposition is found at <https://www2.arims.army.mil>.

- (1) FOIA requests, access, and denials;
- (2) FOIA administrative files;
- (3) FOIA appeals;
- (4) FOIA controls;
- (5) FOIA reports;
- (6) Access to information files;
- (7) Safeguarded nondefense information releases;
- (8) Nonsafeguarded information releases;
- (9) Unauthorized disclosure reports;
- (10) Acknowledgement; and
- (11) Initial Denial Authority designations/appointments.

(m) *Relationship between the FOIA and the Privacy Act (PA).* Not all requesters are knowledgeable of the appropriate statutory authority to cite when requesting records, nor are all of them aware of appeal procedures. In some instances, they may cite neither Act, but will imply one or both Acts. For these reasons, the below guidelines are provided to ensure that requesters receive the greatest amount of access rights under both Acts.

(1) If the record is required to be released under the FOIA, the PA does not bar its disclosure. Unlike the FOIA, the PA applies only to U.S. citizens and aliens lawfully admitted for permanent residence.

(2) Requesters who seek records about themselves contained in a PA system of records and who cite or imply only the PA, will have their requests processed under the provisions of both the PA and the FOIA. If the PA system of records is exempt from the provisions of 5 U.S.C. 552a(d)(1) and if the records, or any portion thereof, are exempt under the FOIA, the requester

shall be so advised with the appropriate PA and FOIA exemption. Appeals shall be processed under both Acts.

(3) Requesters who seek records about themselves that are not contained in a Privacy Act system of records and who cite or imply the PA will have their requests processed under the provisions of the FOIA, since the PA does not apply to these records. Appeals shall be processed under the FOIA.

(4) Requesters who seek records about themselves that are contained in a PA system of records and who cite or imply the FOIA or both Acts will have their requests processed under the provisions of both the PA and the FOIA. If the PA system of records is exempt from the provisions of 5 U.S.C. 552a(d)(1) and if the records, or any portion thereof, are exempt under the FOIA, the requester shall be so advised with the appropriate PA and FOIA exemption. Appeals shall be processed under both Acts.

(5) Requesters who seek access to agency records that are not part of a PA system of records, and who cite or imply the PA and FOIA, will have their requests processed under the FOIA since the PA does not apply to these records. Appeals shall be processed under the FOIA. Requesters who seek access to agency records and who cite or imply the FOIA will have their requests and appeals processed under the FOIA.

(6) Requesters shall be advised in the final response letter, which Act(s) was (were) used, inclusive of appeal rights as outlined in paragraphs (m)(1) through (5) of this section.

(n) *Non-responsive information in responsive records.* Army Activities shall interpret FOIA requests liberally when determining which records are responsive to the requests, and may release non-responsive information. However, should Army Activities desire to withhold non-responsive information, the following steps shall be accomplished:

(1) Consult with the requester, and ask if the requester views the information as responsive, and if not, seek the requester's concurrence to delete the non-responsive information without a

FOIA exemption. Reflect this concurrence in the response letter.

(2) If the responsive record is unclassified, and the requester does not agree to deletion of non-responsive information without a FOIA exemption, release all non-responsive and responsive information that is not exempt. For non-responsive information that is exempt, notify the requester that even if the information were determined responsive, it would likely be exempt under (state appropriate exemption(s)). Advise the requester of the right to request this information under a separate FOIA request. The separate request shall be placed in the same location within the processing queue as the original request.

(3) If the responsive record is classified, and the requester does not agree to deletion of non-responsive information without a FOIA exemption, release all unclassified responsive and non-responsive information that is not exempt. The classified, non-responsive information need not be reviewed for declassification at this point. Advise the requester that even if the classified information were determined responsive, it would likely be exempt under 5 U.S.C. 552(b)(1), and other exemptions if appropriate. Advise the requester of the right to request this information under a separate FOIA request. The separate request shall be placed in the same location within the processing queue as the original request.

(o) *Honoring form or format requests.* Army Activities shall provide the record in any form or format requested by the requester if the record is readily reproducible in that form or format. Army Activities shall make reasonable efforts to maintain their records in forms or formats that are reproducible. In responding to requests for records, Army Activities shall make reasonable efforts to search for records in electronic form or format, except when such efforts would significantly interfere with the operation of the Army Activities' automated information system. Such determinations shall be made on a case-by-case basis.